IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1075 of 2002

HONOURABLE MR.JUSTICE ANIL R. DAVE
HONOURABLE MR.JUSTICE KS JHAVERI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant(s)
Versus
BISMILLAKHAN MOJAMKHAN PATHAN - Opponent(s)

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Appearance :
MR K.T. DAVE, APP, for Appellant : 1,
NOTICE SERVED for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE ANIL R. DAVE

and

HONOURABLE MR.JUSTICE KS JHAVERI

Date : 08/05/2007

CAV ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE KS JHAVERI)

1.0 This appeal is directed against the judgement and order dated 17th September 2002 passed by Sessions Judge, Rajkot District, Rajkot whereby the Sessions Court has convicted the respondent for offence under section 304 Part I of Indian Penal Code and he was ordered to undergo rigorous imprisonment for a term of ten years and to pay fine of Rs.20000/-, in default, to undergo simple imprisonment for a further period of two years.

2.0 The prosecution case, in a nutshell, is as under:

2.1 The accused Bismillakhan Mojamkhan Pathan is resident of Rajkot in Bhomeshwar Plot. He was staying in the house of one Karshanbhai Ahir on rent. One Jubedaben was married to the accused about 8 years prior to the incident. Out of the said wedlock there are two female children. It is alleged that the accused had strained relations with his wife as he was having doubt about her character and there used to be quarrels between them. Because of this Jubedaben left the accused and started living with her mother and filed maintenance application against the accused. Ultimately there was compromise between them and again they started living together.

2.2 On 27th November 2000 when the accused came back home from work, he found his wife Jubedaben talking with a young man. On seeing him, the young man ran

away and Jubedaben entered into her room. The accused made inquiries about the stranger, but no proper reply was given, which resulted into quarrel between them. On the next day at 02.30 hours there was again a quarrel between the accused and his wife about the stranger. Jubedaben could not tolerate doubt raised by the accused and was excited and reprimanded the accused for raising doubt about her character. The accused lost control and throttled her by Dupatta of Jubedaben. She tried to escape but the accused caught hold of her by one hand and covered her mouth and nose and caused constant pressure of hand to her throat which resulted into her death. When he noticed that Jubedaben was not responding to any call, he called Vikrambhai and Mustafabhai of the local area. An ambulance was called and the body of Jubedaben was removed to Civil Hospital, Rajkot. Necessary postmortem was conducted. The matter was informed to the police and complaint came to be lodged. After investigation the investigating officer Vanjarsinh Jhala (PW7) was of the opinion that there were sufficient grounds for launching prosecution against the accused. He filed a report under section 173 of the Code of Criminal Procedure with a proposal to try the accused for offence punishable under section 302 of Indian Penal Code. Accordingly the case was committed to Sessions Court, Rajkot. The said case was registered as Sessions Case No.60 of 2001. The sessions Court, after appreciating the evidence on record, sentenced the respondent as stated hereinabove.

2.3 The State has filed the present appeal praying for enhancement of sentence passed by the Sessions Court.

3.0 Mr. K.T. Dave, learned APP, appearing for the State submitted that the act of pressing the throat and nose of deceased by the accused, coupled with the medical evidence on record as well as the oral evidence of the eye-witness PW2 clearly establishes that the act by which the death of the deceased was caused was done by the accused with an intention to cause her death and therefore the conviction should have been under section 302 of IPC.

3.1 He submitted that the Sessions Court has committed an error in holding that the acts, commissions and omissions on the part of the accused cannot be said to be intentional or an act with pre-meditation or pre-planning.

3.2 Mr. Dave submitted that the relations between the deceased wife and the accused were strained and maintenance proceedings between them were also pending and therefore the accused wanted to get rid of his wife and killed her by pressing her throat and nose.

3.3 Mr. Dave further submitted that looking to the particular facts of the case it is evident that the accused was guilty of offence under section 302 of

IPC and therefore the Sessions Court has committed an error in punishing him under section 304 Part I.

4.0 Though served, none appears for the opponent.

5.0 We have heard Mr. K.T. Dave for the State and perused the documentary evidence on record.

6.0 The postmortem note is at Exh.10. It states that in all there are 7 external injuries on the person of the deceased. It is stated that there are contusions on both the sides of thyroid glands in red colour in size of 1.1/2 x 1 cm, whereas the larynx and trachea were dissected and open. There were also contusions on left side of the neck in the middle in size of 4 cm. X 6 cm reddish in colour and there are also abrasions at the right side of the face and nose, oblique linear abrasion at the left side of the nose, reddish in colour. Rupture of cartilage of nose was also noticed and lungs were found to be congested. All these led to the conclusion that the deceased was not provided with sufficient oxygen prior to death.

7.0 Dr. B.H. Trivedi (PW-1) was examined at Exh.8. According to him he noticed that major organs of the body were found to be congested on account of laxity of oxygen. He was of the opinion that the injuries appearing on the person of the deceased were ante

mortem in nature and she died on account of asphyxia on account of throttling and smothering. His findings are produced at Exh.10.

8.0 Smt. Lajinabibi Mumtajhkhan (PW3), mother in law of the accused is at Exh.17. She has also seen the dead body of the deceased and noticed injuries on the neck of the deceased. She has also confirmed about quarrelsome and strained relations between the deceased and the accused.

9.0 Farjhana Bismillakhan (PW2) is daughter of the deceased. She has claimed herself to be eye witness and has seen the accused while causing throttling to the deceased. Her evidence has been recorded at Exh.16 without administering oath. The evidence of child witness is made admissible under section 118 of the evidence Act. Her presence in the house in midnight is quite natural and that when there is an altercation the child is bound to come out of her sleep. However, from cross-examination it was borne out that she was tutored for this evidence.

10.0 Mustafakhan Sheralikhan (PW4) was examined at Exh.48. He has been declared hostile by the prosecution. Though this witness is not supporting the case of the prosecution in toto, it reveals that Jubedaben died in the house possessed and occupied by the accused at the time of commission of the

incident.

11.0 Vanjarasinh Sabarsinh Jhala (PW7) was examined at Exh.52 who has conducted the investigation of this case. He has recorded the statement of the accused, Panchnama was prepared, recorded statements of several witnesses and chargesheet has been filed.

12.0 Thus as per the evidence on record it is evident that the deceased has died on account of cardiac failure due to asphysix and smothering. As per the deposition of PW7, before the incident in question, there was quarrel between the deceased and accused. From his evidence it also revealed that on the day of the incident the accused wanted to know the stranger who was talking with the deceased. The deceased was not inclined to disclose the name of that person. The anxiety of both resulted in quarrel between them. However, there is nothing on record to establish that there was any intention on the part of the accused to commit the alleged offence. But the fact remains that deceased Jubedaben has died in the house occupied and possessed by the accused. A close scrutiny of the entire events shows that the accused is responsible for causing death of deceased Jubedaben. However, the Sessions Court has found that there was nothing on record to show that the accused was intending to cause death of the deceased nor was there any premeditation. Therefore the Sessions Court has rightly convicted the accused

under section 304 Part I of IPC.

13.0 The only question to be considered in this appeal now is whether there was any intention on the part of the accused to commit murder of the deceased.

14.0 It is an admitted fact that the accused and Jubedaben were having strained relations, she had left the house of the accused, Jubedaben had filed application for maintenance and ultimately there was settlement and both started staying together again. On 4th December 2000 when the accused returned home at night, his wife was talking with a young man. On seeing the accused he had run away and Jubedaben refused to disclose the name of the stranger. There was quarrel about the same. However, nothing happened on that day. On the next day again there was talk about the stranger. Jubedaben could not tolerate doubt raised by the accused and was excited and reprimanded the accused for causing doubt for her character. Accused lost control and had throttled her. The evidence on record shows that before the incident has occurred, there was quarrel between the deceased and the accused for knowing whereabouts or name of the stranger who was talking with Jubedaben. The accused was intending to know the name of the stranger who was talking with the deceased and deceased was not inclined to disclose the name of that person. From these facts it cannot be said that there was any intention or premeditation on the part of the accused to cause death of Jubedaben. It is

only a consequence of reprimand by the deceased the accused caught hold of her and throttled her. The prosecution has failed to establish or adduce sufficient evidence by which the ingredient of intention could be invoked.

15.0 We are of the view that the sessions court has rightly referred to and relied upon the decision in the case of state of Himachal Pradesh Vs. Lekhraj, reported in 2000 SCC Cri. 147, in the case of Devendrapal Singh Vs. State of Delhi, SCC (Cri) 1978 p.983, in the case of Abdl Waheed Khan 2 Waheed & ors Vs. State of Andhra Pradesh, reported in 2002(5) supreme Today 562 Part 124-2002(5).

16.0 The Sessions Court has at length discussed the evidence of the witnesses and the cross-examination thereof. The prosecution has failed to prove the intention to establish the case under section 299 of CrPC. We are of the opinion that from the evidence which has come on record it is very difficult to come to a conclusion that the accused has committed an offence under section 299 of IPC except to the conclusion that the accused has been guilty under section 304 Part I of IPC. No interference is called for in the appeal. The appeal, therefore, fails and is dismissed.

[ANIL R. DAVE, J.]

[K.S. JHAVERI, J.]

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